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No. 02-

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 1782 authorizes the federal district courts to grant discovery to "interested person[s]" for use "in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." The questions presented are:

1. Whether section 1782 authorizes a federal district court to provide a private person with discovery that the foreign jurisdiction itself does not authorize.

2. Whether section 1782 allows civil discovery by a private person when no "proceeding" before a foreign "tribunal" is pending or even imminent.

3. Whether section 1782 extends discovery rights in the United States to private non-litigants.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Intel Corporation is a publicly traded corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Intel Corporation ("Intel") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 292 F.3d 664. The opinion of the district court (Pet. App. 13a-15a) is unreported.

JURISDICTION

The court of appeals entered its decision on June 6, 2002. A timely petition for rehearing or rehearing en banc was denied on September 3, 2002 (Pet. App. 11a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1782 is printed in the appendix to this petition (Pet. App. 17a).

INTRODUCTION AND SUMMARY

The questions presented in this case, concerning the proper interpretation of 28 U.S.C. § 1782, are the subjects of two distinct circuit conflicts, each of which independently warrants this Court's review. Section 1782 authorizes a federal district court to grant discovery to an "interested person" "in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." In the decision below, the Ninth Circuit held that section 1782 entitles respondent Advanced Micro Devices, Inc. ("AMD") to civil discovery in the United States concerning its closest competitor, petitioner Intel Corporation, even though AMD is not a litigant in any current "proceeding" before a foreign "tribunal." The court ruled that AMD had triggered full section 1782 discovery rights simply by complaining about Intel to a foreign law enforcement authority (the European Commission's Competition Directorate General), even though that authority is conducting only what the court of appeals aptly called a "preliminary investigation" (Pet. App. 3a-4a) and European law itself does not authorize AMD to obtain the discovery at issue.

In so ruling, the Ninth Circuit placed itself in acknowledged conflict with other courts of appeals on two different issues of statutory interpretation. First, in granting AMD discovery that the EC itself does not authorize, the Ninth Circuit has joined and deepened an existing circuit conflict concerning whether section 1782 discovery, which Congress intended "to assist foreign and international tribunals" and actual "litigants before such tribunals," *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 2 (1st Cir. 1992), is properly limited to circumstances in which the foreign authority itself would allow discovery. Second, in permitting such discovery even though the EC is currently conducting only a "pre-

liminary investigation," the decision below expressly conflicts with decisions of other courts of appeals that preclude section 1782 discovery where no foreign adjudicative proceeding is underway or at least "imminent." These acknowledged circuit conflicts are ripe for this Court's review, and, until resolved, they will present a continuing affront to principles of international comity. Foreign nations, courts, and litigants must obtain—and perceive that they have obtained—consistent treatment in U.S. courts. Failure to resolve the conflicts presented here would encourage forum shopping and inconsistent results and would compromise international confidence in the American judicial system.

Finally, on the merits, the Ninth Circuit's expansive view of section 1782 is untenable as a matter of law and national litigation policy. The court's holding invites an onslaught of pre-litigation discovery requests from persons involved in countless foreign administrative matters involving U.S. individual or corporate interests, including literally thousands of competition law matters reviewed each year by foreign antitrust agencies. This Court's intervention is needed both to protect U.S. interests and courts from these unfair discovery burdens and to restore national consistency to this deeply unsettled area of law.

STATEMENT

1. The foreign law enforcement inquiry on which respondent AMD has predicated its request for section 1782 discovery is a "preliminary investigation" (Pet. App. 3a-4a) by the European Commission ("EC" or "Commission"). AMD triggered this investigation by complaining to the Directorate General for Competition, an arm of the EC, that Intel had engaged in anticompetitive practices in violation of Articles 81 and 82 of the European Community Treaty.

Upon the receipt of any complaint charging anticompetitive practices, the EC conducts a preliminary inquiry, of the type now pending, before deciding whether to take more

formal prosecutorial steps. 3 E.R. 498.[1] At the conclusion of this preliminary investigation, the EC may proceed on the complaint only if it concludes *both* that a violation of Article 81 or 82 may have occurred *and* that such violation is "significant enough" to warrant the EC's attention. 1 E.R. 10. A decision by the EC not to proceed is subject to limited review by the Court of First Instance. Pet. App. 4a. If, on the other hand, the EC has reason to believe both that a violation may have occurred and that such violation is worthy of its prosecutorial resources, it launches a second stage of its inquiry by issuing a so-called Statement of Objections. 3 E.R. 500. In this more formal stage, the party under investigation has the right to request a non-public hearing to present its views to the EC. 3 E.R. 501. As discussed below, however, even in this second stage, the EC continues to act not as an "adjudicator," but as a law enforcement agency. *See* pp. 15-16, *infra*.

In performing its law enforcement functions, the EC wields extensive investigative powers. Among other things, the EC is empowered to conduct "dawn raids"—on-site inspections at companies' premises conducted without prior notice. 3 E.R. 499. It is also empowered, under Article 11 of European Economic Community Council Regulation 17, to issue requests for documents and for answers to written questions (these are known as "Article 11 requests") and to compel responses to such requests through various sanctions. *Id.* In part because the EC possesses such extensive authority to obtain directly for itself any information it deems relevant, it relies on its investigative powers to obtain documents from companies under investigation and does not depend upon private complainants to conduct that function on its behalf. 3 E.R. 502.

Moreover, as a law enforcement agency, the EC does not separate its investigative and decisionmaking functions. The

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[1] "E.R." cites indicate the relevant volume and page numbers of the Ninth Circuit "Excerpts of Record."

EC does not employ judges or any other independent decisionmakers to resolve disputes between its investigating case officers and companies under investigation. 3 E.R. 503. Instead, the same investigative case officers who are empowered to conduct dawn raids and demand the production of documents through Article 11 requests are responsible for preparing the EC's final decisions at the conclusion of its inquiries or formal investigations. 3 E.R. 498, 502; EC Regulation 17, Art. 10(5) (3 E.R. 529); *see also* note 4, *infra*.

Complainants to the EC have limited rights. Under applicable European law, complainants are "limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities." *AKZO Chemie BV* v. *E.C. Comm'n*, [1987] 1 C.M.L.R. 231, 248 (3 E.R. 570). Accordingly, complainants have no discovery rights and "may not in any circumstances be given access to documents containing business secrets" of a competitor. *Id.* at 259 (3 E.R. 575). Indeed, complainants have no right to view any documents submitted to the EC itself during a preliminary investigation of the type now pending. 3 E.R. 500-01.

2. On October 23, 2000, AMD complained to the EC about Intel's alleged violations of the European Union's competition laws. 3 E.R. 505. Three months later, on January 18, 2001, the EC sent Intel an Article 11 request for information. *Id.* The request asked Intel to produce documents and answer questions related to AMD's general allegations. *Id.* Intel replied to the request on February 28, 2001. *Id.* Three months later, the EC provided Intel with a redacted copy of AMD's complaint. 3 E.R. 506. In August 2001, Intel submitted to the EC (but not to AMD) a response to that complaint. *Id.* The EC has not asked Intel to answer any further Article 11 requests, and the investigation remains in this preliminary phase. *Id.* Neither Intel nor AMD has been provided with copies of any other submissions made by the other to the EC. There is no process for complainants and

companies under investigation to serve each other with their submissions to the EC. 3 E.R. 503.

During this preliminary inquiry, AMD urged the EC to direct Intel to turn over, for the EC's own use, documents that Intel had produced in unrelated litigation in the United States with a company called Intergraph Corporation.[2] The EC, however, declined to seek those documents. *See* Supp. E.R. 6-7.

3. On October 1, 2001, AMD applied to the district court for discovery under 28 U.S.C. § 1782. 1 E.R. 1. AMD asked the court to compel Intel, ostensibly for the EC's use in the ongoing preliminary investigation, to produce the very documents from the Intergraph proceeding that the EC itself had declined to pursue. *Id.* The total volume of documents sought by AMD is estimated at approximately 600,000 pages. 1 E.R. 93-95. Intel argued in response that section 1782 does not authorize such discovery because, among other considerations, AMD is not a litigant in a "proceeding" before a "tribunal" and, in any event, AMD has no right to documents that are not discoverable under the law of the foreign jurisdiction for whose benefit they are supposedly sought.

The district court denied AMD's application. 3 E.R. 755. The court emphasized that AMD's complaint to the EC "is in the initial stage of preliminary inquiry" and that the EC, "in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation." *Id.* The court thus concluded that the EC does not conduct adjudicative "proceedings" and is not a "tribunal" for purposes of section 1782. *Id.*

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[2] In that lawsuit, Intergraph had accused Intel of patent infringement as well as various other state and federal law violations, including antitrust violations. Intel prevailed on the merits of the antitrust claims in that suit. *Intergraph Corp.* v. *Intel Corp.*, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001).

4. The court of appeals reversed. It held that, to qualify for discovery under section 1782, AMD need not be a litigant in an ongoing or even imminent foreign adjudicative proceeding. It is enough, the court reasoned, that the current preliminary investigation may eventually "lead[] to quasi-judicial proceedings," in that an ultimate EC decision not to prosecute will be subject to judicial review and a decision to prosecute would trigger a more formal second-stage inquiry. Pet. App. 6a. In the court's view, the second-stage inquiry is "quasi-judicial" enough that its prospect triggers discovery rights in the United States under section 1782, even though the EC maintains no separation between its prosecutorial and decisionmaking functions, Pet. App. 14a, and even though the EC does not conduct "adversary proceedings between the complainant and the undertaking concerned." *AKZO Chemie*, [1987] 1 C.M.L.R. at 248 (3 E.R. 570). Finally, rejecting the need for any "threshold showing . . . that what is sought be discoverable in the foreign proceeding," the court found it inconsequential that EC procedures categorically deny AMD the very discovery that it seeks, supposedly for the benefit of the EC, through United States law. Pet. App. 7a-8a.[3]

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[3] The Ninth Circuit subsequently denied Intel's motion to stay the proceedings pending disposition of this petition for certiorari. It remanded the case back to the district court, where, unless the judgment below is reversed, the court will ultimately need to resolve questions about, among other things, the discoverability of particular categories of documents under general discovery principles. Meanwhile, the EC's preliminary investigation in response to AMD's complaint is almost certain to remain open "until the second half of 2003 at the earliest." Intel C.A. Mot. for Stay 18 (citing Decl. of Alastair Sutton ¶ 11).

REASONS FOR GRANTING THE PETITION

Treating section 1782 as a font of "liberal discovery" (Pet. App. 8a), the Ninth Circuit held that a private company may come to a United States court to obtain, for the ostensible benefit of a foreign law enforcement authority, massive discovery that the foreign authority itself does not authorize the company to receive and has specifically declined to request for its own use. Moreover, the Ninth Circuit held that such discovery is available where, as here, no "proceeding" before a foreign "tribunal" is underway or even imminent, even though the plain language of section 1782 conditions any discovery on the existence of such a proceeding. In the process, the Ninth Circuit placed itself on the wrong side of two distinct and fully mature circuit conflicts. If this case had arisen in several other circuits, where a less expansive view of section 1782 prevails, the result would have been the opposite of the one reached here. This Court's intervention is thus needed to restore national consistency to the manner in which U.S. courts respond to requests for discovery for use in foreign jurisdictions.

I. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits Rejecting Discovery Under Section 1782 Where The Foreign Authority Does Not Itself Provide For Discovery

It is undisputed that European Community law denies discovery rights to mere complainants such as AMD. 3 E.R. 503. The Ninth Circuit nonetheless construed section 1782 to permit the very discovery that EC law forecloses, reasoning that section 1782 requires no "threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." Pet. App. 8a. The court reached that conclusion even though the undisputed purpose of section 1782 is to facilitate international comity by "assist[ing] foreign and international tribunals." *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 2 (1st Cir. 1992); *see also* S. Rep. No. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788

(section 1782 is designed to "adjust[]" U.S. discovery procedure "to the requirements of foreign practice and procedure").

This anomalous holding unhinges section 1782 from that intended purpose and, as the court of appeals acknowledged (Pet. App. 7a-8a), conflicts with established precedent in several other circuits. The First Circuit has held that "a litigant requesting assistance under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law." *Asta Medica*, 981 F.2d at 7. The court explained, among other things, that "United States discovery rules are far more liberal than their foreign counterparts"; that construing section 1782 to permit litigants to side-step foreign discovery limitations would "place United States litigants in a more detrimental position than their opponents when litigating abroad"; that "[t]his result would be contrary to the concept of fair play embodied in United States discovery rules" and in section 1782 itself; and that, even "more importantly, foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Id.* at 5-7.

Likewise, the Eleventh Circuit has determined that "the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance." *In re Request for Assistance From Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (citations omitted); *accord In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988). And the Fifth Circuit has similarly indicated that it too will follow that approach when confronted with a discovery request by a private person (as distinguished from a foreign government). *See In re Letter Rogatory From First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995) ("[t]he case law in this area is very clear" in mandating "a discoverability determination when the request for information comes from a private litigant"); *see also In re Letter of Request From Crown Prosecution Service of United Kingdom*, 870

F.2d 686, 692 n.7 (D.C. Cir. 1989) (quoting *Trinidad & Tobago*, 848 F.2d at 1156).

In contrast, the Second and Third Circuits, splitting with the First, Fifth, and Eleventh, have joined the Ninth in generally permitting liberal discovery under section 1782 even when the law of the foreign jurisdiction does not authorize it. For example, the Second Circuit "ha[s] held that there is no requirement of discoverability implied in the statute; that is, the district court need not satisfy itself that the discovery sought in the petition is of information that would be discoverable under the laws of the foreign jurisdiction in which the proceeding is pending." *See Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998) (citing *In re Application of Gianoli*, 3 F.3d 54, 59-61 (2d Cir. 1993)). As that court observed, "[t]his holding is in contrast to the First and Eleventh Circuits and to a certain degree the D.C. Circuit." *Id.* (citing *Asta Medica*, *Trinidad & Tobago*, and *Crown Prosecution*, 870 F.2d at 687, 692-93 & 692 n.7). Similarly, the Third Circuit has expressly refused to "impos[e] a requirement that the materials sought be discoverable in the foreign jurisdiction." *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). This six-court, three-to-three circuit conflict is plainly ripe for this Court's resolution, and this case provides the appropriate vehicle for resolving it.

On the merits, the First, Fifth, and Eleventh Circuits are correct in limiting section 1782 discovery to cases in which such discovery would serve its underlying statutory objective: effectuating, rather than grossly enlarging, the discovery rights authorized by the foreign jurisdiction on whose behalf the discovery is supposedly sought. This case presents a case study in why that limitation is critical to the comity objectives of section 1782. European Community law places particular emphasis on precluding mere complainants from obtaining the proprietary documents of their rivals, since "[a]ny other solution would lead to the unacceptable consequence that [a company] might be inspired to lodge a complaint with the Commission solely in order to gain access

to its competitors' business secrets." *AKZO Chemie*, [1987] 1 C.M.L.R. at 259 (3 E.R. 575). The decision below thus not only diverts section 1782 from its intended purpose—accommodating the discovery needs of foreign jurisdictions—but charts "a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6.

In the court of appeals, AMD mischaracterized the subject of this circuit conflict as a question of "reciprocity," but that is a misnomer—and a telling one. The issue here is not whether EC law permits private-party discovery in aid of analogous "proceedings" in the United States, but whether EC law permits private-party discovery for use in the very EC investigation that this discovery is ostensibly designed to support. That fact underscores the tenuousness of the Ninth Circuit's ruling on the merits. It is undisputed not just that EC law denies such discovery to private complainants, but also that the EC found that the specific discovery materials at issue in this case are so inconsequential *to its own investigation* that it rejected AMD's suggestion that the EC itself require Intel to produce them. *See* Supp. E.R. 6-7. And, of course, AMD has no independent discovery rights against Intel under domestic U.S. law, because it has not filed a lawsuit in this country and has therefore not taken on the rights and responsibilities that would follow from becoming an actual *litigant*.

The upshot of the decision below is thus that, throughout the Ninth Circuit, section 1782 now imposes civil discovery obligations in circumstances where neither foreign law nor domestic U.S. law would permit such discovery to proceed. Congress did not intend that bizarre result, and this Court's intervention is needed to conform the application of section 1782 to its legislative purpose: accommodating the actual discovery needs of foreign *tribunals* and the actual *litigants* that appear before them.

II. The Panel's Decision Conflicts With Other Circuits' Holdings That Litigation Must Be Pending Or At Least "Imminent" Before Discovery Under Section 1782 Is Appropriate

The decision below deepens a separate circuit conflict on an independent issue as well: whether, as the Second Circuit has held, an adjudicative or quasi-adjudicative "proceeding" before a foreign "tribunal" must be pending or at least imminent before section 1782 permits discovery in the United States.

When a party files an antitrust complaint with the EC, the EC conducts a "preliminary investigation," which is not "considered an adversarial proceeding." Pet. App. 3a-4a. Only at the conclusion of this "pre-investigation" (1 E.R. 10) does the EC decide whether the complaint has sufficient merit and significance to warrant more formal prosecutorial action. Pet. App. 4a; *see also* pp. 4-5, *supra*. For purposes of its analysis, the court of appeals accepted that the EC is currently engaged in this first-stage "preliminary investigation"; that this preliminary investigation is not itself an "adjudicative" or "quasi-adjudicative" proceeding; that it therefore does not itself qualify as a "proceeding" before a "tribunal" under section 1782; and that no such proceeding is pending now or even "imminent." Pet. App. 2a, 6a; *see also* note 4, *infra*.

In nonetheless granting relief to AMD, the court of appeals held that discovery is appropriate so long as the pending *non*-adjudicative investigation, while not itself a "proceeding" before a "tribunal" for purposes of section 1782, is "one *leading to* quasi-judicial proceedings," even if such proceedings are not imminent. Pet. App. 6a (emphasis added). That holding is flawed, and warrants this Court's review, on two independent levels.

a. First, by rejecting any requirement that the "proceeding" for which discovery is sought "be imminent" (Pet. App. 6a), the decision below deepens the Ninth Circuit's conflict

with ten years of Second Circuit precedent. *See id.* (following *United States* v. *Sealed 1, Letter of Request for Legal Assistance From Deputy Prosecutor Gen. of Russian Fed.*, 235 F.3d 1200, 1205 (9th Cir. 2000) (discussing conflict)).

Under the most natural reading, section 1782 authorizes civil discovery only if, among other things, a "proceeding" is already underway before a foreign "tribunal." If Congress had intended to permit civil discovery *before* the commencement of such a proceeding, it would not have limited the category of investigations eligible for pre-litigation discovery to "criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a). Similarly, with language closely tracking that of section 1782(a), Congress has made separate provision for civil discovery in the United States "to assist a foreign antitrust authority . . . in determining whether a person has violated . . . foreign antitrust laws," even before the commencement of an adjudicative proceeding—but only "[o]n the application of the Attorney General . . . in accordance with an antitrust mutual assistance agreement." 15 U.S.C. § 6203(a). If Congress had wished to extend similar pre-litigation rights to *private* entities, it would have done so. Consistent with this analysis, the Eleventh Circuit has indicated that, unlike a foreign governmental institution, "a private individual may need to be a *litigant* in a *pending* proceeding in order to be an 'interested person'" entitled to discovery under section 1782. *Trinidad & Tobago*, 848 F.2d at 1155-56 (emphasis added); *see also Asta Medica*, 981 F.2d at 2 (section 1782 is designed "to assist foreign and international tribunals" and "litigants before such tribunals").

Nonetheless, erring on the side of greater discovery rights, the Second Circuit has expanded upon the plain language of section 1782 to grant private entities discovery in anticipation of quasi-adjudicative foreign proceedings that, while not pending, are at least "imminent." As that court has elaborated, however, "a proceeding must be 'imminent—*very likely to occur and very soon to occur*'—in order to satisfy the statutory requirements" of section 1782. *Euromepa*, 154

F.3d at 29 (citation omitted, emphasis added). The Second Circuit has repeatedly reaffirmed this "imminence" requirement as an essential limitation on the ability of interested persons to obtain civil discovery under section 1782. *See, e.g., In re Application of Ishihara Chem. Co.*, 251 F.3d 120 (2d Cir. 2001); *In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996); *In re Request for Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

Under the Ninth Circuit's holding below, by contrast, the statutory requirement of a "proceeding" before a "tribunal" is satisfied so long as there is some prospect of such a proceeding at some future—potentially distant—time. Pet. App. 6a. If this case had arisen in the Second Circuit rather than the Ninth, AMD's discovery request would have failed on this ground alone. As the Ninth Circuit acknowledged in rejecting any imminence requirement (*id.*), no quasi-adjudicative proceeding is pending now, and the next stage in the EC process (if there is one at all) is not "very soon to occur" even now, *Euromepa, S.A.*, 154 F.3d at 29, and certainly was not "very soon to occur" when the district court ruled. This case thus squarely engages the acknowledged conflict between the Second and Ninth Circuits. Certiorari is warranted for that reason alone, quite apart from the Ninth Circuit's related errors discussed below.

b. Whether or not a quasi-adjudicative proceeding must be "imminent" to warrant discovery under section 1782, the Ninth Circuit further erred by ruling that the present *non*-adjudicative investigation will someday be followed by a (non-imminent) proceeding that is properly characterized as "quasi-adjudicative." In this respect as well, the Ninth Circuit was mistaken.

Even if the EC were eventually to take more formal prosecutorial action on AMD's complaint, that second-stage process also would not qualify as a quasi-adjudicative "proceeding" before a "foreign or international tribunal." A

"proceeding" under section 1782 is one "in which an adjudicative function is being exercised." *Lancaster Factoring*, 90 F.3d at 41 (citation omitted). In determining whether a foreign entity qualifies as an adjudicative "tribunal" under section 1782, U.S. courts place particular emphasis on whether the entity maintains a separation of functions between prosecutors and decisionmakers. For example, in *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (2d Cir. 1967), Judge Friendly held for the Second Circuit that a "tribunal," for purposes of section 1782, typically maintains "separation between the prosecutorial and adjudicative functions." *Id.* at 1021.

The decision below is impossible to square with these well-settled principles. Even in the second, more formal phase of the complaint process, the EC does not conduct "adversary proceedings between the complainant and the [company] concerned." *AKZO Chemie*, [1987] 1 C.M.L.R. at 248 (3 E.R. 570). As in the first phase, a complainant has no discovery rights whatsoever and, indeed, has no right of access even to submissions made to the EC itself. 3 E.R. 501, 503. Moreover, if a hearing is held, no rules of evidence apply, and the EC makes no provision for taking testimony under oath, compelling the testimony of material witnesses, or cross-examining any witness. 3 E.R. 502-03. And, as to the Second Circuit's principal criterion for "tribunal" status under section 1782—namely, separation of prosecutorial and decisionmaking functions—the EC maintains no such separation: the same investigative staff that conducts "dawn raids" prepares the EC's decision. 3 E.R. 502.[4] Finally, European

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[4] The court below mistakenly assumed that an advisory committee of EC member states drafts the ultimate EC decisions as a neutral decisionmaker. Pet. App. 4a, 6a-7a. In fact, the EC advisory committee does not draft the EC's decisions, which are prepared instead by the investigative staff. 3 E.R. 498; *see* EC Regulation 17, Art. 10(5) (3 E.R. 529) (requiring notice to advisory committee to enclose "a preliminary draft decision"). Because the advisory committee performs only an "advisory task," moreover, it does not conduct an independent review of the evi-

law itself makes clear that the EC acts not as an adjudicator, but as a law enforcement agency investigating allegations of competition law violations. For example, the EC's Eleventh Report on Competition Policy emphasizes that the Commission's "procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial." 3 E.R. 646; *see also AKZO Chemie*, [1987] 1 C.M.L.R. at 248 (3 E.R. 570) (Advocate General of the European Community's highest court concluding that the EC does not conduct "adversary proceedings between the complainant and the [company] concerned"); *Hasselblad (GB) Ltd.* v. *Orbinson*, [1985] 1 All E.R. 173, 181 (3 E.R. 703) (holding that "the [EC] is acting in a manner which is dissimilar to that of either civil or common law courts of justice" and is "better labelled as administrative rather than judicial or quasi-judicial").

In short, a second-phase EC inquiry, even if it were "imminent," could not qualify as a "proceeding" before a "tribunal" for purposes of section 1782. As a result, the prospect of any future "quasi-adjudicative" proceedings here is at best speculative (as well as non-imminent), because one possible outcome of the current non-adjudicative process is yet another non-adjudicative process.[5]

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dence gathered in the investigation and instead is merely "informed of the main points of fact and law" by the EC's staff. *Radio Telefis Eireann* v. *Commission*, [1991] E.C.R. II 485, 499-500 (attached to Intel C.A. Opp. to Mot. to Expedite at Tab 1); *see also* Article 10(6) of EC Regulation 17 (3 E.R. 529). And the EC is free to disregard the advisory committee's advice in any event. The court was also incorrect in assuming that an independent hearing officer issues a recommended decision to the EC. Pet. App. 4a. To the contrary, the hearing officer reports to the EC solely on "procedural issues." Commission Decision of May 23, 2001, 2001 O.J. (L 162/21), Art. 13 (emphasis added) (attached to Intel C.A. Opp. to Mot. to Expedite at Tab 2).

[5] If the EC eventually decides *not* to expend its prosecutorial resources by proceeding to this second stage, AMD could then appeal to a European court, which would exercise limited review of this *nol-pros* decision and, at most, would remand the matter back to the EC for addi-

III. This Case Presents Issues Of International Significance Warranting This Court's Review.

As discussed, the purpose of discovery under section 1782 is "to assist foreign and international tribunals, and the *litigants* before such tribunals." *Asta Medica*, 981 F.2d at 2 (emphasis added).[6] AMD is not a "litigant" in a pending adjudication, but a complainant to a law enforcement agency. Congress gave no indication that it intended to authorize discovery by private persons other than the single class it identified repeatedly in the legislative history of section 1782: litigants.[7] Indeed, Congress *could* have had no valid basis for giving complainants to foreign law enforcers greater discovery rights than complainants to domestic law enforcers, and the latter complainants possess *no* right to invade the files of the competitive rivals they accuse.

The Ninth Circuit's decision, however, makes nonsense of section 1782 in precisely this respect. It disregards fundamental differences between mere *complainants* to law en-

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tional investigation. The prospect of such an appeal, however, is both speculative and temporally remote, and of course it cannot somehow convert the current first-stage "pre-investigation" into a "proceeding" before a "tribunal." By analogy, decisions by the Department of Justice to take no action on a private party's antitrust allegations would not somehow become "quasi-adjudicatory" decisions of a "tribunal" if this Court were to overrule *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and permit the federal courts to exercise limited review of the reasonableness of such decisions.

[6] *See also Lancaster Factoring*, 90 F.3d at 42 ("'interested person' includes 'a party to the foreign . . . litigation'"); *Trinidad & Tobago*, 848 F.2d at 1155 (unlike prosecutors, "a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person'").

[7] *See* S. Rep. No. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. at 3788 (explaining that Congress's intent was to aid "tribunals and *litigants*" in obtaining discovery, and notes that assistance is specifically "extended to international tribunals and *litigants before such tribunals*") (emphasis added); *see also id.* at 3789 (section 1782 "permits effective and desirable assistance to foreign and international courts and *litigants* before such courts") (emphasis added).

forcement agencies and actual *litigants*, who enjoy significantly broader rights. Unlike litigants, complainants have no obligation to plead a case that satisfies some legal sufficiency standard. Unlike litigants, complainants do not develop evidence for use at trial; they rely on government enforcers to develop evidence and bring a case. And, unlike litigants, they have no obligations toward opponents; indeed, they do not even serve them with a complaint. While filing a lawsuit before an adjudicative tribunal is a solemn undertaking that triggers ongoing obligations, a mere complaint to a law enforcement agency does not. Indeed, the EC took months to disclose to Intel even a *redacted* copy of AMD's complaint, and, to this day, AMD has not received a copy of Intel's response, and neither company has had notice of any of the other company's communications with or submissions to the EC in connection with the EC investigation.

The decision below thus vastly expands the class of persons who may seek section 1782 discovery, effectively rewriting the statute in a manner never contemplated by Congress. The decision opens the door to the taking of discovery by non-litigants who are unwilling to assume the burdens and obligations of being a litigant. It exposes individuals and businesses to costly fishing expeditions by rivals. And it subverts the foreign legal regime that section 1782 is designed to assist by flouting that regime's mandate that a complainant "may not in any circumstances be given access to documents containing business secrets" of a competitor lest it "lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets." *AKZO Chemie*, [1987] 1 C.M.L.R. at 259 (3 E.R. 575).

Indeed, the Ninth Circuit's decision threatens to open the specific floodgates that the European Court of Justice sought to close in *AKZO Chemie*, allowing any company to take discovery of its closest commercial rivals simply by asking a foreign enforcement agency to investigate them. It also enables any company to interfere with mergers subject to cross-border review by complaining to foreign law enforcers and

seeking discovery from merging competitors. Thousands of such transactions are reviewed each year by the EC and foreign enforcement agencies with similar procedures. Complainants to U.S. antitrust agencies have no right to take discovery of the accused party, but the Ninth Circuit has now conferred that right, under U.S. law, upon complainants abroad.

Moreover, permitting discovery under these circumstances serves no discernible interest of the foreign authority. As the court acknowledged, the EC is empowered to seek information directly from alleged infringers and to search their businesses through "dawn raids." *See* Pet. App. 3a-4a; 3 E.R. 499. It needs no help from AMD to obtain evidence from Intel. Indeed, the EC has no use for the documents sought by AMD; as noted, it turned down AMD's request that it seek those documents itself. *See* Supp. E.R. 6-7. The Ninth Circuit nevertheless concluded that "liberal discovery" (Pet. App. 8a) is needed to help AMD, a non-litigant, present documents to enforcers who do not want them. This makes no legal or policy sense whatsoever.

Finally, there is no clear textual basis for limiting the scope of the Ninth Circuit's decision to documentary, as opposed to testimonial, evidence. By its terms, section 1782 permits district courts not just to order U.S. entities "to produce a document or other thing for use" in a foreign proceeding, but also to order any "person . . . to give his testimony or statement" for the same use. Pet. App. 17a. Unlike U.S. jurisdictions, however, the EC has made a conscious and much-discussed decision to make no provision for compelling the testimony of individuals. *See* 3 E.R. 502-03; *see also* 3 E.R. 646 (EC determination that competition investigations must not be turned into trials). If, as the Ninth Circuit held, section 1782 contains none of the sensible limits enforced by the First, Second, Fifth, and Eleventh Circuits, the competitive rivals of U.S. companies could come to the United States to circumvent deliberate European restrictions

not just on documentary discovery, but on testimonial discovery as well.

In sum, by eviscerating the established principle that private persons must be litigants in adjudicative proceedings in order to obtain section 1782 discovery, the decision below violates the statutory requirement of a "proceeding" before a "tribunal," ignores the unavailability of pre-litigation discovery in civil cases, erroneously conflates criminal investigations and civil disputes, and flouts clear and repeated expressions of congressional intent. Unless this Court grants certiorari and reverses, the decision will impose, at the behest of non-litigants, onerous and often one-sided discovery burdens on U.S.-based individuals and businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2002

APPENDICES

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APPENDIX A

United States Court of Appeals,
Ninth Circuit

ADVANCED MICRO DEVICES, INC., Petitioner-Appellant,
v.
INTEL CORPORATION, Respondent-Appellee.

No. 02-15070

Argued and Submitted May 15, 2002.
Filed June 6, 2002

[292 F.3d 664]

* * * *

[665] Before HAWKINS and SILVERMAN, Circuit Judges, and RESTANI,* Judge.

OPINION

MICHAEL DALY HAWKINS, Circuit Judge.

In a question of first impression with respect to the European Community, we must determine the scope and reach of 28 U.S.C. § 1782,[1] which permits domestic discov-

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* Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

[1] The statute provides:

§ 1782 Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be

ery for use in foreign proceedings. We face two questions: (1) whether the proceeding for which discovery is sought qualifies as "foreign or international tribunal"; and (2) if so, whether Section 1782 requires a showing that the information sought would be discoverable or admissible in that proceeding. Because we conclude that the proceeding for which the discovery at issue is sought meets the statutory definition, we reverse the district court. As the district court will now need to deal with the merits of the discovery request, we determine that Section 1782 does not impose a threshold requirement that the material also be discoverable in the foreign court.

Background Facts & Procedural History

Advanced Micro Devices, Inc. ("AMD") and Intel Corporation ("Intel") are worldwide competitors in the microprocessor industry. Believing that Intel was abusing its dominant market position in the European Common Market, AMD filed a complaint with the Directorate General-Competition ("Directorate") of the European Commission ("EC"). AMD's complaint, now in the preliminary investigative stage, alleges [666] that Intel's actions violate Article 82 of the Treaty establishing the EC ("the EC Treaty"). To support its complaint, AMD sought discovery under Section

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made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782.

1782, asking that Intel produce documents and transcripts of testimony from a proceeding in another district court, *Intergraph Corp.* v. *Intel Corp.*, No. CV 97-N-3023 (N.D. Ala.). Intel objected, contending that the matter before the Directorate was not a "proceeding in a foreign or international tribunal" within the meaning of Section 1782. The district court agreed with Intel and this timely appeal, which we advanced for argument, followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

Standard of Review

Questions of statutory interpretation are subject to de novo review while the district court's application of Section 1782 to the facts is reviewed for an abuse of discretion. *United States* v. *Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Fed.*, 235 F.3d 1200, 1203, 1206 (9th Cir. 2000).

Nature of Proceeding for which Discovery is Sought

AMD's complaint was filed under Article 82 of the EC Treaty and Article 3(2)(b) of EC Council Regulation. Article 82 generally prohibits "abuse by one or more undertakings of a dominant position within the common market." The Directorate is a sub-unit of the EC, authorized to enforce Article 82 by conducting investigations of alleged infringement, to propose curative measures in published decisions, and to impose fines and penalties. EC Treaty Art. 85.

Upon receipt of a complaint, the Directorate first conducts a preliminary investigation. It may gather information on its own and provide the complainant with an opportunity to support its allegations. This initial investigation is not considered an adversarial proceeding. *AKZO Chemie BV* v. *Commission*, 1 C.M.L.R. 231, 248 (E.C.J. 1986). The Directorate also has the authority to seek information directly from the alleged infringer and may punish a failure to provide information with fines and penalties. Council Regulation

17/64, arts. 11, 14. Within the EC, the Directorate also has the authority to enter and search an alleged infringer's business. Council Regulation 17/64, arts. 15(1)(b), 16(1)(c).

Completion of the Directorate's preliminary investigation results in a decision whether to pursue the complaint. If the decision is not to proceed, the complainant is advised and given an opportunity to submit further information in support of the allegations. *Koelman* v. *E.C. Comm'n*, [1996] 4 C.M.L.R. 636, 649 (Ct. of First Instance 1996). The EC then decides whether to formally proceed in a final written decision. A decision not to proceed is subject to review by the Court of First Instance and ultimately by the Court of Justice for the European Communities ("Court of Justice"), the court of last resort for EC matters. *Stork Amsterdam BV* v. *E.C. Comm'n*, [2000] 5 C.M.L.R. 31, 42 (Ct. of First Instance 2000).

A decision to proceed with the complaint operates on a slightly different track. If the EC makes a preliminary determination that infringement may have occurred, it serves a statement of objections on the alleged infringer and appoints an independent hearing officer to conduct a hearing. Commission Decision of 23 May 2001, 2001/462/EC; Council Regulation 17/64, art. 19; Commission Regulation 2842/98, arts. 10-14. The hearing officer then presents conclusions to the Directorate who, in turn, makes a recommendation to the EC on how to proceed. A decision by the EC to dismiss, like a Directorate decision [667] not to proceed after a preliminary investigation, is subject to review by the Court of First Instance. Commission Decision of 23 May 2001, arts. 13-16. If the EC decides to proceed with the complaint, a preliminary decision is drafted and forwarded to the EC Advisory Committee, which consists of representatives of the EC member states. The Advisory Committee drafts an opinion for the EC which, if adopted, becomes a final enforceable decision within the European Community. *Id.*; *Hasselblad* v. *Orbison*, [1985] Q.B. 475. 496 (1984).

We begin by noting that the language used by Congress in Section 1782 is broad and inclusive, including by way of example even criminal investigations prior to formal accusation. Nor does the text of Section 1782 suggest a distinction between civil and criminal proceedings. Our prior decisions also read the legislative history surrounding the adoption of Section 1782 broadly to include "bodies of a quasi-judicial or administrative nature" as well as preliminary investigations leading to judicial proceedings. *In re Letters Rogatory from Tokyo Dist.*, 539 F.2d 1216, 1218-19 (9th Cir. 1976); *see also United States* v. *Sealed 1*, 235 F.3d at 1204. We also noted that the 1964 amendments to Section 1782 eliminated the requirement that the foreign proceeding be "pending" and broadened the discretion of district courts to act on foreign assistance requests. *Id.*; *see also* S. Rep. No. 1580, § 9 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.[2]

Intel argues that the process for which AMD seeks discovery is purely administrative in nature, and, at least with respect to a recommendation to proceed to a complaint, pre-

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[2] The Senate stated:

> The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.... In view of the constant growth of administrative and quasi- judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) is also extended to international tribunals and litigants before such tribunals. The assistance thus made available replaces, and eliminates the undesirable limitations of, the assistance extended by sections 270 through 270g of title 22, United States Code, which are proposed to be repealed.

liminary to a non-judicial proceeding. In the past, we have rejected applications for discovery where the "proceeding" was a commission of inquiry authorized to investigate, report and make recommendations to a non-judicial body. *In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada*, 488 F.2d 511, 512 (9th Cir. 1973). But the Directorate makes its recommendations to the EC—a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties. EC decisions are appealable to the Court of First Instance and then to the Court of Justice. Thus, the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings.

Nor need the proceedings be imminent, as Congress made clear through the elimination of the requirement that the proceeding be "pending." *United States* v. *Sealed 1*, 235 F.3d at 1205. Here the Directorate's investigation will lead to a decision whether to proceed. A decision not to go forward would be appealable to the Court of First Instance, thus "leading to a judicial proceeding." A decision to proceed with a complaint would lead to [668] hearings that are at least quasi-judicial in nature and then to an enforceable, judicially-reviewable decision.

Harkening to our own separation of powers traditions, Intel argues that the EC is not a tribunal because the distinction between prosecutor and decision-maker is blurred, if not non-existent. This might be of concern if the EC had a discernable institutional bias toward a particular outcome of the initial investigative process. *In re Letters Rogatory Issued by the Dir. of Inspection of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (Income Tax Officer with sole responsibility to make and then evaluate government's argument not a "tribunal" under § 1782). The EC process, however, takes care to permit both complainant and alleged infringer an opportunity for input to the eventual recommendation and inserts an independent entity—the EC Advisory Committee—between the Directorate's recommendation that a formal complaint be

issued and the EC's decision to file a final enforceable decision.

In sum, we agree that the EC is an administrative body and that the investigation being conducted by its Directorate is related to a quasi-judicial or judicial proceeding. AMD has the right to petition the EC to stop what it believes is conduct that violates the EC Treaty, to present evidence it believes supports its allegations, to have the EC evaluate what it presents and to have the resulting action (or inaction) reviewed by the European courts. Although preliminary, the process qualifies as a "proceeding before a tribunal" within the meaning of 28 U.S.C. § 1782.

Discoverability

Our determination that Section 1782 includes the proceedings for which AMD seeks discovery will require the district court to resolve the merits of AMD's discovery request. Bolstered by holdings from the First and Eleventh Circuits, Intel argues for the imposition of a threshold showing that AMD could obtain the discovery it now seeks in the EC proceedings. *In re Application of Asta Medica*, 981 F.2d 1, 5-7 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). The Second and Third Circuits refuse to impose such a requirement. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101-02 (2d Cir. 1992); *Euromepa, SA* v. *R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998); *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). The remaining circuits to consider the issue distinguish between a request from a foreign tribunal and one from a private party, not imposing a threshold discoverability requirement on the former. *In re Letter of Request from Amtsgericht Ingolstadt, Fed. Republic of Germany*, 82 F.3d 590, 592-93 (4th Cir. 1996); *In re Letter Rogatory From First Court of*

First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310-11 (5th Cir. 1995).[3]

We have previously rejected a requirement regarding admissibility in the foreign tribunal. *In re Request for Judicial Assistance from Seoul Dist. Criminal Court*, 555 F.2d 720, 723 (9th Cir. 1977). [669] For good and sound policy reasons, we now reject such a requirement with respect to discoverability, be the request from a private party or foreign tribunal. We find nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding. *Bayer*, 146 F.3d at 193; *Euromepa*, 154 F.3d at 28; *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993). Had Congress wished to impose such a requirement on parties, it could have easily done so. Judge McKeown's analysis with respect to any requirement that the foreign proceedings be "imminent" is persuasive in this regard. *See United States* v. *Sealed 1*, 235 F.3d at 1205.

Finally, allowance of liberal discovery seems entirely consistent with the twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts. *Malev*, 964 F.2d at 100.

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[3] The topic has drawn considerable commentary in the academy, with most commentators preferring the *Euromepa* approach. Hans Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 234-37 (1994); Peter Metis, *International Judicial Assistance: Does 28 U.S.C. § 1782 Contain an Explicit Discoverability Requirement?*, 18 Fordham Int'l L.J. 332, 360-67 (1994); Steven Saraisky, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. Chi. L. Rev. 1127, 1148-50 (1994); Walker Sanzone, *Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. Section 1782*, 29 Vand. J. Transnat'l L. 117, 147-50 (1996).

Conclusion

The district court's determination that the proceeding for which AMD seeks discovery does not qualify under 28 U.S.C. § 1782 is reversed.[4] Because we also determine that there is no requirement that AMD show that what is sought would be discoverable in the proceedings before the European Commission, the district court may proceed to consider AMD's request on the merits.

REVERSED and REMANDED.

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[4] Obviously, district court opinions to the contrary are expressly overruled. *See, e.g., Application for Assistance in a Foreign Proceeding*, 147 F.R.D. 223 (C.D. Cal. 1993).

APPENDIX B

United States Court of Appeals,
Ninth Circuit

ADVANCED MICRO DEVICES, INC., Petitioner-Appellant,
v.
INTEL CORPORATION, Respondent-Appellee.

No. 02-15070
D.C. No. CV-01-07033-WAI
(Northern District of California, San Jose)

[Filed Sept. 3, 2002]

ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges, and RESTANI,* Judge.

The panel voted to deny the petition for rehearing. Judges Hawkins and Silverman voted to deny the petition for rehearing en banc. Judge Restani made no recommendation on the en banc petition.

The full Court was advised of the petition for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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* Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

APPENDIX C

United States District Court
for the Northern District of California

ADVANCED MICRO DEVICES, INC., Applicant,
v.
INTEL CORPORATION, Respondent.

NO. C- 01-7033 MISC WAI

January 7, 2002, Decided
January 7, 2002, Filed

[2002 U.S. Dist. LEXIS 11511]

MEMORANDUM OF DECISION

Applicant ADVANCED MICRO DEVICES, INC. ("AMD") moves for an order directing Respondent INTEL CORPORATION ("INTEL") to produce documents and other material pursuant to 28 U.S.C. § 1782(a) which provides in pertinent part that

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .

AMD seeks the production of documents and testimony elicited in discovery in the case of *Intergraph Corporation* v. *Intel Corporation*, CV-97-N-3023 NE, which was filed and conducted in the Northern District of Alabama, and which AMD contends had similar antitrust allegations and contentions to those of the instant case. The production of these materials is [*2] sought in and of AMD's complaint filed concerning INTEL with the Commission of European Communities ("COMMISSION") which among other duties is charged

with the enforcement and investigation of prohibited agreements which restrict or distort competition. European Treaty Articles 81 and 82.

The COMMISSION, in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation.

In the instant case no Statement of Objections has been issued. The case is in the initial stage of preliminary inquiry.

Dr. Ingo Brinker, who is counsel for Applicant has indicated his opinion that the COMMISSION performs quasi-judicial functions "analogous to the Federal Trade Commission." Brinker Decl. 6.

Reliance is also placed by Applicant upon the opinion of Professor Hans Smit, one of the draftsmen of § 1782, that the COMMISSION exercises quasi-judicial powers and that § 1782 is applicable to proceedings in which those powers are exercised. Smit, *International Litigation Under the United States Code*, 65 Columbia L. Rev., 1015, 1026 n.71, 1027 n.3 (1965).

The COMMISSION has itself contradicted these assertions in its Eleventh [*3] Report on Competition Policy (1981) wherein it stated that "its procedures relating to restrictive practices and abuse of dominant position is administrative and not judicial; it must not be turned into a trial." Parr Decl. 15. Dr. Brinker's opinion as to the character of the COMMISSION's function is also contradicted by the Declaration of James B. Rill, a practitioner before the Federal Trade Commission "for over 30 years." Rill Decl. 5:20-22. Based upon his background and opinion, Mr. Rill concluded, ". . . it is clear to me that the European Commission's investigative and enforcement procedures are not at all comparable to the adjudicatory functions of the Federal Trade Commission and lack the qualities that make a proceeding 'adjudicative.'" Rill Decl. 6:1-3.

A "proceeding" within the meaning of § 1782 means one in which an "adjudicative function is exercised." *Lancaster*

Factoring Co., Ltd. v. *Mangone*, 90 F.3d 38, 41 (2d Cir. 1996).

Based upon the record now before the court, I conclude that Applicant's contentions are not supported by applicable authority, and the Application is therefore DENIED.

DATED: 1/7/02

WILLIAM A. INGRAM

United States[*4] District Judge

APPENDIX D

Statutory Provision

[28 U.S.C. § 1782]

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.